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No. 75-952

In the Supreme Court of the United States

OCTOBER TERM, 1975

MABEL FLINN, GENEVA LYNN, AND GARNET LOISEAU,
Petitioners,

vs.

FMC CORPORATION and LOCAL 9, TEXTILE WORKERS UNION OF AMERICA, AFL-CIO,
Respondents.

BRIEF OF RESPONDENT FMC CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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BLEE

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BRIEF OF RESPONDENT FMC CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit correctly held that the District Court did not abuse its discretion in approving the settlement of this class action?

STATEMENT OF THE CASE

Petitioners are named plaintiffs and members of a plaintiff class, who seek review of the Court of Appeals' af-

firmance of the District Court's approval of the settlement in this class action.

This class action was filed on March 24, 1971 pursuant to Title VII of the Civil Rights Act of 1964 [1] (hereinafter Title VII) and under the provisions of Rule 23(b) (2) Federal Rules of Civil Procedure[2] on behalf of a class of all female persons who were employed or might be employed by defendant FMC Corporation in its plant located in Parkersburg, West Virginia.

Plaintiffs alleged that defendants had violated Title VII by discrimination against persons in the class because of sex with respect to compensation, terms, conditions and patterns of employment and by limiting, segregating and classifying such persons in ways denying females equal employment opportunities and otherwise adversely affecting their status. [3]

Plaintiffs further alleged that there were common questions of law and fact affecting rights of members of the class; that the class was so numerous that joinder of all the members was impracticable; that a common relief was sought, that the claims or defenses of the representative parties were typical of the claims or defenses of the class; that the interest of the class would be adequately represented by the named plaintiffs and that the defendants had

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[1] Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended 42 U.S.C. Sec. 2000(e), et seq.

[2] Federal Rule of Civil Procedure 23 is herein referred to as Rule 23.

[3] Complaint, paragraphs VI(A) & (B); VII; VIII(B); FMC App. A1-A8.

acted or refused to act on grounds generally applicable to the class. [4]

For all of these alleged violations, the Complaint sought an injunction against the continued discriminatory practices, appropriate relief and back pay and attorneys fees. [5]

Defendants answered the Complaint and denied all material allegations. Thereafter, extensive discovery proceedings, which included depositions and at least seven sets of interrogatories, were conducted. This discovery gave plaintiffs complete information with respect to employment and compensation patterns of the defendants.

Following this discovery, a hearing was scheduled and held on June 19, 1973 before the District Court on a Motion for Summary Judgment and a Petition to Certify a Class Action under Rule 23 (b)(2). Following this hearing, the Court denied the Motion for Summary Judgment and certified that the proceedings should be maintained as a class action under the provisions of Rule 23 (b)(2) Federal Rules of Civil Procedure. The District Court order following the hearing on June 19th also instructed the parties to proceed to trial under its local rule. Thereafter, counsel representing all parties engaged in several settlement conferences that eventually resulted in an agreement to resolve all pending issues, including aggregate compensation to the class.[6]

At all times during the discussions, conferences, and negotiations among counsel for all parties, there was com-

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[4] Complaint, paragraph II; FMC App. A1-A8.

[5] Complaint, paragraph XIV; FMC App. A1-A8.

[6] FMC App. A9-A10.

plete agreement that the amount to be distributed to the class was fair and adequate and that, independently, by reason of changes in work practices and procedures adopted by the defendants, all of the substantive relief requested by the plaintiffs had been granted and that any prospective relief subject to an injunction under Title VII was no longer appropriate.

During the course of these discussions, the only contention vigorously urged by counsel for the class was that the named plaintiffs, Petitioners herein, should receive a disproportionate share of the amount agreed upon as an appropriate settlement for the aggregate class. The issue of allocation of funds among members of the class was, by the settlement agreement, to be submitted to the District Court.

The settlement agreement provided that it was subject to the approval of the District Court. Accordingly, it was submitted to the Court at a hearing in Wheeling, West Virginia on November 7, 1973 at which time counsel for all parties recommended approval of the settlement. The Court requested that each party submit a proposed plan of distribution for the settlement fund. Thereafter, on further order of the Court on April 5, 1974,[7] counsel representing all the parties made and negotiated a proposed plan of distribution, together with a form of notice to be given to all members of the class and to the Equal Employment Opportunity Commission.

On May 28, 1974 at a noticed hearing before the District Court in Parkersburg, West Virginia a form of notice was settled by the Court [8] and the manner and means

[7] P. App. A4 and A5.

[8] P. App. A6 to A12.

of distribution were determined. All counsel for the parties and each named plaintiff were present. Also present at the hearing, at the instance of the three named plaintiffs, now Petitioners, was Attorney James Bukes of Pittsburgh representing the Equal Employment Opportunity Commission.

The notice, which the District Court approved and directed to be served, fully described the precise amounts and benefits to be received by each class member and gave each member an opportunity to object to the terms of the settlement by mailing a letter to the Clerk of the Court at Elkins, West Virginia.[9] Although all members of the class of more than 250 were notified in writing of the proposed settlement, only five filed a written notice of objection. Three of the objectors are the Petitioners.[10]

Pursuant to a timely written notice to the Equal Employment Opportunity Commission and to all persons who had asserted objections to the settlement[11] a further hearing on the question of whether the proposed settlement was just, fair and reasonable was held in Parkersburg, West Virginia on August 2, 1974. All of the members of the class asserting objections to the proposed settlement (including three of the objectors, Petitioners herein), appeared at the hearing on August 2, 1974 represented by counsel and assisted by Ms. Virginia Pagen of the Equal Employment Opportunity Commission. Each objector

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[9] P. App. A6 to A12.

[10] The other two objectors were parties to the settlement by consolidation of a separate action alleging different issues than alleged by Petitioners. They accepted the District Court's decision and did not file an appeal.

[11] FMC App. A11-A12.

testified concerning the bases of their objections. The District Court gave each objector an opportunity to present any evidence as to the reason for the objection and engaged in an extensive interrogation; the Court characterized the purpose by stating that ". . . the entire record must be taken and the Court must apply the standards of just, fair and reasonable to the proposed settlement and the formula of distribution . . ."[12] Following the Court's examination, all counsel, including counsel for the objectors, were given an opportunity to question each of the objectors, call other witnesses or develop additional evidence regarding the question of whether the settlement agreement was just, fair and reasonable.

After all testimony was concluded, the District Court Judge issued an oral opinion in which he found that the proposed settlement was just, fair and reasonable and must be accepted. The text of the District Court's opinion is found in Respondent's Appendix commencing at page A13.

On August 19, the District Court entered its Order approving the settlement agreement as being just, fair and reasonable and expressly overruled the objections of the named plaintiffs, Petitioners herein, and denied their request to withdraw from the class.[13]

In response to the Appeal filed by the named plaintiff objecting class members, the Fourth Circuit Court of Appeals considered the question of whether it was an abuse of discretion for the District Court to approve the settlement. On October 6, 1975, the Court of Appeals issued its decision, which affirmed the District Court's exercise

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[12] FMC App. A18.

[13] P. App. A13 to A17.

of discretion in approving the settlement agreement as a just, fair and reasonable settlement and agreed that there was no requirement for a trial on the merits for the named plaintiff objectors prior to approval of the settlement.

On January 5, 1976, Petitioners filed the Petition for a Writ of Certiorari to the Court of Appeals for the Fourth Circuit. On January 19, 1976, in response to FMC's application, the Clerk of this Court extended the time within which this Brief in Opposition must be filed to and including February 25, 1976.

SUMMARY OF ARGUMENT

The Court of Appeals properly held that when the terms of a settlement agreement in a Title VII class action have been determined to be just, fair and reasonable, it is proper for a court approved settlement in a Rule 23(b)(2) class action to bind all class members, including those who objected to the settlement.

Prior to the settlement of this action the District Court had, in full compliance with Rule 23(c)(1), determined that the appropriate requisites of Rule 23(a) and (b) existed. Accordingly, the Court ordered that this litigation proceed under the provisions of Rule 23(b)(2).

After extensive discovery and prolonged negotiations, and following completion of trial preparation, the parties through counsel submitted a proposed settlement agreement to the District Court. In accordance with the provisions of Rule 23(e), the Court directed that a notice of the terms of the settlement agreement be directed to all class members. The Court assured itself that all members who objected to the proposed settlement were allowed to be present with counsel and receive a full opportunity to be

heard on any and all objections. The three named plaintiff Petitioners appeared at the hearing on August 2, 1974 with their counsel to express their objections to the proposed settlement. They contended that although the settlement was appropriate for the class it did not properly settle their individual personal claims. They requested to withdraw from the class.

On August 19, 1974, the District Court entered its Order finding the proposed settlement was adequate, reasonable and met the standards of fairness and was therefore approved. It overruled the objections of the Petitioners and denied their request to withdraw from the class.

Petitioners contend that although the settlement may be just, fair and reasonable as to other members of the class they represented, as named plaintiff class members they should have a separate right to continue their action to a trial on the merits.

Sound policy considerations, as well as the language of Rule 23, militate against the argument proposed by Petitioners. Petitioner's argument that the Court of Appeals should be reversed because the named plaintiff Petitioners were denied their individual personal right to pursue the litigation finds no support in any Appellate Court decision that has considered settlement agreements under Rule 23(b)(2).

Further, Petitioners are unable to illustrate any way in which the named plaintiff class action members have been denied due process of law. On the contrary, careful examination of all of the issues in this case will demonstrate that all of the rights of the Petitioners were fully protected by the District Court. Moreover, all Appellate Court decisions involving Title VII class action settlement agreements approved under Rule 23(b)(2) have

affirmed the principle that a settlement agreement that is just, fair and reasonable may be adopted by the District Court and made binding on all members of the class, including objectors.

The Court of Appeals, after reviewing all of these factors, correctly determined that the District Court had not abused its discretion in approving the terms of this agreement. Further, whether or not the District Court abused its discretion obviously depends upon the particular facts of this case. This Court's reconsideration of that question will affect only these three litigants. Respondent submits that this question is not appropriate for the grant of a Writ of Certiorari.

ARGUMENT

A. IT IS PROPER FOR A FAIR AND ADEQUATE SETTLEMENT, APPROVED BY THE COURT, TO BIND ALL CLASS MEMBERS OF A TITLE VII CLASS ACTION CERTIFIED UNDER RULE 23 (b)(2).

Petitioner seeks to persuade this Court to depart from the well established principles uniformly applied in Title VII class actions that Rule 23 permits the settlement of a class action to bind all class members. Petitioners' suggestion on page 20 of their Petition that the District Court's action constituted reversible error when it permitted the settlement of the class action under Rule 23(b)(2) over the objections of the named plaintiffs because the named plaintiffs never authorized their counsel to enter into the agreement is not well founded.

In this case, the District Court fully complied with all of the procedures specified in Rule 23 and with all of the constitutional due process requirements.

After initial discovery, the District Court held that this was a proper class action under Rule 23(b)(2). In so holding, the court found pursuant to Rule 23(a) that: the class was so numerous that joinder was impracticable; there were questions of law and fact common to the class; the claims of the three named plaintiffs who were the representative parties were typical of the claims of the class they had sought to represent; and the representative parties would fairly and adequately protect the interests of the class.

The District Court found, further, that this was a proper action under Rule 23(b)(2) because defendants'

actions were generally applicable to the whole class. It thus determined that the alleged sex discrimination presented a cohesive claim or issue that was directed at a homogeneous class.[14]

Thirty-two months after the commencement of this action, after extensive discovery, depositions and protracted negotiations between counsel for each of the parties, and after completion of the trial preparation, the parties, through their respective counsel, submitted a proposed settlement agreement to the court.[15] Pursuant to Rule 23(e), the District Court directed that a notice of the terms of the settlement agreement be directed to all of the class members.

The Court assured that all class members who objected to the proposed settlement were allowed to file their objections. They were subsequently notified[16] of the date of a court hearing and were allowed to be present with counsel and to give testimony and receive a full opportunity to be heard on any and all objections they had to the settlement.

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[14] By the very nature of the action a (b) (2) class is bound together by a pre-existing or continuing legal relationship and therefore must be cohesive. See Note: *Managing the Large Class Action: Eisen* v. *Carlisle & Jacquelin* 87 Harv. L.Rev. 426, 441 (1973). Thus, a Title VII action to challenge an employer's hiring and promotional practices with respect to a common characteristic of sex which are alleged to have a discriminatory effect on a class of applicants and employees is particularly appropriate for consideration under (b)(2). The drafters of Rule 23 specifically contemplated that suits against discriminatory hiring and promotion practices would properly be maintained under (b)(2). *Advisory Committee's Note to Proposed Amendments to Rule 23,* 39 F.R.D. 69, at 102 (1966).

[15] See FMC App. A9 and A10.

[16] See FMC App. A11 and A12.

The three named plaintiff Petitioners, individually and as representatives of the class, appeared with counsel of record and with additional representatives from the Equal Employment Opportunity Commission to object to the settlement agreement. At the hearing on August 2, 1974 testimony was fully elicited from each named plaintiff Petitioner by the District Court Judge and by all counsel. Although each named plaintiff Petitioner alluded to additional evidence that could be adduced in support of their reasons for objecting to the settlement and in support of their individual separate and greater claims to a monetary settlement, each refused to produce such additional evidence when requested to do so.

On August 19, 1974, the District Court entered its Order finding that the proposed settlement was adequate, reasonable and met the standard of fairness and was therefore approved. The Court further ordered that the objections were overruled and that requests for withdrawal from the class were denied.[17]

Petitioners argue at pages 20 and 21 that the District Court erred in entering a judgment that disposed of their individual claims. Petitioners contend that regardless of whether the settlement was just, fair and reasonable as to the other members of the class they purported to represent, each individually named plaintiff class member has a separate personal right to continue her action to a trial on the merits if she does not like the amount and terms of the settlement.

The position urged by the Petitioners in this respect is totally inconsistent with the purposes of Rule 23, and with the concepts of a Title VII class action as fully developed and articulated by the numerous authorities that have considered this issue with respect to Rule 23(b)(2) class

[17] P. App. A13-17.

actions. Moreover, even Petitioners recognize the compelling force of these authorities. Contrary to the principal thrust of their argument, they state:

> "Since in a (b)(2) action the individual class members are not given an opportunity to opt out of the class, but are bound by the final judgment, courts take great care to make certain that an individual's Title VII rights are not denied through settlement."[18]

The findings of numerosity of class members, common questions of law and fact, typicality of class representatives and adequacy of the class representatives that are required by Rule 23, and that were made in the instant case, clearly contemplate common treatment of all class members. Moreover, the findings in the Title VII class action that an employer's conduct is actionable, ". . . on grounds generally applicable to the class, thereby making appropriate . . . relief with respect to the class as a whole"[19] makes such actions uniquely and particularly fit for adjudication under Rule 23(b)(2) because such a class shares a common characteristic subject to discrimination and is cohesive as to the claims alleged.

In *Wetzel* v. *Liberty Mutual Insurance Company*,[20] the United States Court of Appeals for the Third Circuit directly confronted this issue on the appeal of an order granting the plaintiff's Motion for Summary Judgment.

There, as here, a class action for a homogeneous class of female employees alleging sex discrimination was found to meet the numerosity requirements of 23(a)(1).

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[18] Petitioner's Brief P17.

[19] Rule 23 (b)(2).

[20] 508 F.2d 239, (3rd Cir. 1975), *cert. denied*, 421 U.S. 1011 (1975).

There, as here, the requirements of 23(a)(4) were met in that the class representatives were determined to be adequate representatives of the class, because the plaintiffs' attorney was qualified,[21] and the interests of the class members were not antagonistic.

There, as here, the relief to be granted by the District Court in the form of back pay or increased promotional opportunities would benefit all members of the class. It should be noted that this is contrary to the thrust of *Airline Stewards and Stewardesses Association, Local 550* v. *American Airlines, Inc.*,[22] extensively relied upon by the Petitioners in their Brief, where the relief sought differed materially with respect to different members of heterogeneous classes.

In *Wetzel*, as here, prospective injunctive relief was not necessary, the employer's practice having already been changed prior to the consideration of the issues by the District Court.

There, as here, the employer defendant was alleged to have acted with respect to the plaintiffs on grounds generally applicable to the class making appropriate relief to the class as a whole.

There, as here, the District Court determined that the class action properly could be maintained under Rule 23(b)(2).

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[21] It is worthy of noting that Mr. Whitworth Stokes, counsel for plaintiffs, specialized in cases of this kind in which he represented employees against companies who allegedly violated the Civil Rights Act of 1964. Mr. Stokes was formerly employed by the Equal Employment Opportunity Commission in Washington, D.C., and was a specialist in this line of work (See *Evans* v. *Sheraton Park Hotel*, 503 F.2d 17, (D.C. Cir. 1974).

[22] 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974).

There, in granting the Motion for Summary Judgment, as here in approving the settlement agreement, the District Court found that all members of the class were bound by the decision.

There, as here, the issue was raised as to whether the basic nature of the Title VII class action was altered by reason of the employer's change of policy, which obviated the requirement for injunctive relief.

There, as here, the question was presented as to whether objecting members of the class should be allowed to opt out of the class and not be bound by the judgment.

In short, there, as here, Petitioners urged that the objecting class members should be allowed to proceed to litigate their individual claims as if the case were a class action maintained pursuant to Rule 23(b)(3).

In *Wetzel,* the Court of Appeals made an extensive analysis of the distinction between a class action maintained under Rule 23(b)(2) and one maintained under Rule 23(b)(3) with respect to Title VII actions filed under the Civil Rights Act of 1964. In discussing the characteristics of a 23(b)(2) class action, it said:

> "A (b)(2) suit is permitted when the opposing party has acted or refused to act on grounds generally applicable to the class. By its very nature, a (b)(2) class must be cohesive as to those claims tried in the class action. The rule recognizes that the res judicata effect of a judgment may only be tested in a subsequent action. Because of the cohesive nature of the class, Rule 23(c)(3) contemplates that all members of the class will be bound. Any resultant unfairness to the members of the class was thought to be outweighed by the purposes behind class actions; eliminating the possibility of repetitious litigation and providing small claimants with a means of obtaining redress

for claims too small to justify individual litigation [Citations omitted]."[23]

The precise issue in the *Wetzel* case was whether a Title VII suit for injunctive relief certified as a class action under Rule 23(b)(2) must be redetermined under Rule 23(b)(3) and required to comply with the (b)(3) procedures when it developed that injunctive relief was no longer necessary. The Court decided that it was not and that the procedures of Rule 23(b)(2) were uniquely appropriate because of their superior *res judicata* effect and because these procedures would avoid unnecessary complication of the litigation. It said:

"First, a Title VII suit against discriminatory hiring and promotion policies is necessarily a suit to end discrimination because of a common class characteristic, in this case sex. The conduct of the employer is actionable 'on grounds generally applicable to the class,' and the relief sought is 'relief with respect to the class as a whole.' The class, all sharing a common characteristic subjected to discrimination, is cohesive as to the claims alleged in the complaint. Thus, a Title VII action is particularly fit for (b)(2) treatment and the drafters of Rule 23 specifically contemplated that suits against discriminatory hiring and promotion policies would be appropriately maintained under (b)(2). Since a Title VII suit is essentially equitable in nature, it cannot be characterized as one seeking exclusively or predominantly money damages.

The basic nature of a Title VII suit is not altered merely because the employer's change of discriminatory policy prior to the motion for summary judgment has obviated the need for injunctive relief. The conduct of the employer is still answerable 'on grounds generally applicable to the class,' and the relief

[23] 508 F.2d 239, 248-249.

> sought is still 'relief with respect to the class as a whole.' The cohesive characteristics of the class are the vital core of a (b)(2) action. Functionally, these characteristics of the class are still intact in the suit. Nothing has changed to require the procedural protections of (b)(3) to determine the presence or absence of liability. The class is still appropriately maintained under (b)(2) [Citations omitted]."[24]

The Court also considered the question of whether, when the requirements of both (b)(2) and (b)(3) were met, the (b)(3) procedures should be utilized in order to provide the procedural protection of notice and an opportunity to "opt out" for members of the class who elect not to be bound by the determination. It emphatically rejected this argument, relying on the well reasoned decision of the Southern District of New York in *Van Gemert* v. *Boeing*.[25] It said:

> "If the actions are classified under (b)(3), members of the class could elect to opt out and thereby not be bound by the judgment. This would permit the institution of separate litigation and would defeat the fundamental objective of (b)(2), to bind the members of the class with one conclusive adjudication. *Van Gemert* v. *Boeing Company*, supra, at 130-131. As discussed above, the procedural protections of (b)(3), opting out and notice, are necessary because of the heterogeneity of the (b)(3) class. They are unnecessary for the homogeneous (b)(2) class.
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>
> We therefore agree with the *Van Gemert* principle that an action maintainable under both (b)(2) and (b)(3) should be treated under (b)(2) to enjoy its superior res judicata effect and to eliminate the pro-

[24] 508 F.2d 239, 250-251.

[25] 259 F. Supp., 125 (S.D.N.Y. 1966).

> cedural complications of (b)(3) which serve no useful purpose under (b)(2). This principle has been widely adopted in the federal courts [Citations omitted]."[26]

A refusal of this Court to grant certiorari[27] in the *Wetzel* case clearly indicates that the Court considers the case law on the effect of class action proceedings to be so well settled that further explication is unnecessary.

Contrary to the position urged by the Petitioners in their Brief, the named plaintiff petitioners herein have not been denied any of the elements of due process.

These Petitioners were the named plaintiffs in the action; they instituted the suit as class representatives; they were represented by experienced counsel; they sought a class determination under Rule 23(b)(2); they were afforded every opportunity to appear in court, and did appear at all of the scheduled court hearings personally and through counsel and other representatives at each formal stage of the litigation; they were furnished notice of the proposed settlement of the class action pursuant to Rule 23(e); they were furnished notice of hearing before the court on their objections;[28] they testified in court on their own behalf in opposition to the settlement agreement; they filed an appeal to the Fourth Circuit Court of Appeals and again were adequately represented by counsel.

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[26] 508 F.2d 239, 252-253.
See also Moore, *Federal Practice*, 2d ed. (1973) Para. 23.31[3].

[27] 421 U.S. 1011. (1975).

[28] FMC App. A11 and A12.

It is difficult to understand what additional standards due process could require.[29] Certainly Petitioners here have advocated none.[30]

To now urge, as the Petitioners do in their Petition for Certiorari before this Court, that as the adequate representatives of the (b)(2) class approved by the Court they are empowered to fashion a remedy appropriate for all other members of the class except themselves, while they continue to remain free to pursue individually their separate personal rights so as to fashion different and greater relief for themselves is an attempt unfairly to exploit the purposes of the class action procedure.[31]

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[29] See *Patterson* v. *Newspaper Deliverers Union*, 514 F.2d 767, n.2 (2d Cir. 1975); *petition for cert. filed*, 44 U.S.L.W. 3110 (U.S. July 28, 1975) (No. 155) *sub nom. Larkin* v. *Patterson;* see also discussion of due process requirements in *Wetzel* v. *Liberty Mutual*, supra, at 256.

[30] Petitioners' argument that the District Court's approval of the settlement agreement violates the Rule Making Statute of 1934, 28 U.S.C. 2072 (1948), in that it abridges substantive personal rights of the litigants is specious. It should be noted that the petitioner's substantive rights to be free of sex-based discrimination in an employment relationship were created by Statute under Title VII of the Civil Rights Act of 1964, effective July 2, 1965, and do not rise to constitutional proportions. As such the legislature created elaborate procedures to prevent unlawful employment practices (Section 706, et seq.) and empowered the courts to enforce its mandates. Since its inception, courts have been particularly attentive in managing Title VII cases to encourage private settlement and eliminate litigation. *Oatis* v. *Crown Zellerbach Corp.*, 298 F.2d 496 (5th Cir. 1968); *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Airline Stewards and Stewardesses Association, Local 550* v. *American Airlines*, 455 F.2d 101 (7th Cir. 1972).

[31] It should be noted that of the 253 female members of this class certified by the court, all of the class members accepted the settlement agreement without objection except the three original named plaintiffs, Petitioners herein.

D THROUGH

Petitioners' argument at page 21 that named plaintiffs authorized to act as representatives in a class action certified under Rule 23(b)(2) should not be denied the right to litigate their personal claims finds no support in the case law. Sound policy considerations as well as the clear language of Rule 23 militate against the concept urged by Petitioners.[32]

Any procedure that would allow exclusion of the authorized class representatives at this stage of the litigation would negate settlement possibilities in any class action. To permit named plaintiff class representatives an opportunity to opt out of the very class they sought to represent after settlement negotiations had been concluded and were acceptable to the Court and to all other members of the class would significantly impair the incentive for defendants ever to undertake settlement negotiations and would remove the most significant aspect of the settlement of Title VII class actions, i.e., the avoidance of the cost of protracted litigation. Further, the concept proposed by the Petitioners, if adopted, would totally frustrate the purposes behind the management of such actions and would preclude efficient judicial administration and vastly multiply the number of class actions that the federal courts would be required to handle.

Finally, there is no conflict in any of the Circuit Court of Appeals' decisions regarding the proper disposition of a class action maintained under Rule 23(b)(2). The Petitioners have not cited, and Respondent has not found, any

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[32] Because of the cohesive nature of the class, Rule 23 (c)(3) contemplates that all members of the class will be bound. See *Advisory Committee's Note to Proposed Amendments to Rule 23*, 39 F.R.D. 69, at 106 (1966); C. Wright, *Federal Courts*, Sec. 72 at 314 (2dEd. 1970).

decided case that has accepted this unique argument now urged upon this Court by the Petitioners. Numerous appellate decisions considering the proper disposition of the 23(b)(2) class and setting forth the standards for appellate review of such settlements approved by the lower courts demonstrate that all of the class members should be bound by the decision notwithstanding their independent objections.[33]

Upon analysis of each of the cases cited and relied on by Petitioners, it will be found that any case permitting individual members of the class to opt out and pursue a separate remedy were cases that were certified or determined to be appropriate for treatment under 23(b)(3) because heterogeneous interests were being advocated.[34]

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[33] The Fourth Circuit Court of Appeals in the case *sub judice;* the third Circuit in *Bryan* infra; and the Second Circuit in *Patterson,* supra, have all considered the binding effect of a settlement agreement on objecting class members and have squarely decided it was proper to bind all class members. Accord, *Mungin* v. *Florida East Coast Railway Co.,* 318 F.Supp. 720 (M.D. Fla. 1970), *aff'd per curiam,* 441 F.2d 728 (5th Cir. 1971), *cert. denied,* 404 U.S. 897 (1971). In this case the Fifth Circuit in a Motion to set aside a District Court Judgment approving a settlement agreement in a 23(b)(2) class action under the Railway Labor Act clearly recognized that it was not an error or law for the District Court to find that plaintiff-movant-objectors who had been present and expressed dissatisfaction with the settlement to be bound by its approval.

[34] Compare *Airline Stewards,* 490 F.2d 636, 642, n.5, supra. In this case it will be noted that the Court of Appeals for the 7th Circuit determined that the plaintiff class was attempting to act for two distinct groups of class members with conflicting, adverse and antagonistic interests. The court required that the action with respect to these heterogeneous classes be maintained as a 23(b)(3) action. The court clearly inferred that Rule 23(b)(2) is applicable to a homogeneous class.

B. THERE IS NO BASIS FOR REVERSING THE COURT OF APPEALS' DETERMINATION THAT THE DISTRICT COURT'S APPROVAL OF THE SETTLEMENT AGREEMENT WAS NOT AN ABUSE OF DISCRETION.

The United States Court of Appeals for the Fourth Circuit in this case[35] considered the question "Did the District Court abuse its discretion in approving the settlement agreement?" It said:

> "The scope of our review in such an appeal is narrow. We are not, in reviewing the settlement, to 'substitute our ideas of fairness for those of the district judge.' Our power, as the appellants concede and the authorities abundantly affirm, is only to be exercised 'upon a clear showing that the district court abused its discretion' in approving the settlement. The most important factor to be considered in determining whether there has been such a clear abuse of discretion is whether the trial court gave proper consideration to the strength of the plaintiffs' claims on the merits, for, as the Court said in *City of Detroit* v. *Grinnell Corporation* (2d Cir. 1974) 495 F 2d 448, 455, '[I]f the settlement offer was grossly inadequate . . . it can be inadequate only in light of the strength of the case presented by the plaintiffs.'
>
> The trial court should not, however, turn the settlement hearing 'into a trial or rehearsal of the trial' nor need it 'reach any dispositive conclusions on the admittedly unsettled legal issues' in the case. It is not part of its duty in approving a settlement to establish that 'as a matter of legal certainty . . . the

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[35] *Flinn* v. *FMC Corporation and Local 9, Textile Workers Union of America, AFL-CIO*, Docket No. 74-2198, (4th Cir. 1975). P. App. A18.

> subject claim or counterclaim is or is not worthless or valuable.' It is not, though, to give to the settlement 'mere boilerplate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law.' While it should extend to any objector to the settlement 'leave to be heard, to examine witnesses and to submit evidence' on the fairness of the settlement, it is entirely in order for the trial court to limit its proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision. So long as the record before it is adequate to reach 'an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated' and 'form an educated estimate of the complexity, expense and likely duration of such litigation . . . and all other facts relevant to a full and fair assessment of the wisdom of the proposed compromise,' it is sufficient.
>
> In reviewing the record and evaluating the strength of the case, the trial court should consider the extent of discovery that has taken place, the stage of the proceedings, the want of collusion in the settlement, and the experience of counsel who may have represented the plaintiffs in the negotiation. The fact that all discovery has been completed and the cause is ready for trial is important, since it ordinarily assures sufficient development of the facts to permit a reasonable judgment on the possible merits of the case.'' [36]

Respondent agrees with this precise statement of the standard of review applicable to this question as stated by the Court of Appeals and believes it correctly

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[36] P. App. A19-A23.

states and represents the law in all of the federal circuit courts.[37]

Whether or not the District Court abused its discretion obviously turns upon the particular facts of this case. This Court's reconsideration of that question will affect no one other than the three named plaintiffs in this action. Respondent submits that this question of such limited importance is not appropriate for the grant of a Writ of Certiorari. In any event, however, the Court of Appeals in this case correctly determined that there was no abuse of discretion. The settlement agreement approved by the District Court and affirmed by the Circuit Court of Appeals in this action concluded a Title VII class action maintained under Rule 23(b)(2) and resolved all issues relating to 253 represented class members, including counsel fees and expenses.

At the time of the approval of the settlement agreement, the District Court had available and had considered substantial evidence developed as a result of very extensive pretrial discovery, pretrial conferences, disposition of preliminary motions, depositions, oral arguments and written briefs, as well as testimony introduced at the hearing on the motion to approve the settlement.

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[37] *City of Detroit* v. *Grinnell Corp.*, 495 F. 2d 448, 455 (2d Cir. 1974); *Newman* v. *Stein*, 464 F.2d 689 (2d Cir. 1972), cert. denied, 409 U.S. 1039 (1972); *United Founders Life Ins. Co.* v. *Consumers Nat. Life Ins. Co.*, 447 F. 2d 647 (7th Cir. 1971); *Mungin* v. *Florida East Coast Railway Co.*, 318 F. Supp. 720 (M.D. Fla. 1970), aff'd per curiam, 441 F. 2d 728 (5th Cir. 1971), cert. denied, 404 U.S. 897 (1971); *Bryan* v. *Pittsburgh Plate Glass Co.*, 494 F. 2d 799 (3rd Cir. 1974), *cert. denied, sub nom. Abate* v. *Pittsburgh Plate Glass Co.*, 419 U.S. 900 (1974); *Patterson* v. *Newspaper Deliverers Union*, (2d Cir. 1974) supra; *West Virginia* v. *Chas. Pfizer & Co.*, 440 F. 2d 1079, 1085 (2d Cir., 1971), cert. denied, 404 U.S. 871 (1971).

In evaluating the basis for the District Court's determination that the settlement was just, fair and reasonable, the Court of Appeals correctly recognized that the District Court was not obligated to turn the settlement hearing into a trial or a rehearsal of a trial because the very purpose of a settlement agreement is to avoid the trial and to effect a resolution of disputed issues.[38]

Essentially, Petitioners appear to urge in this Petition that while the settlement agreement was just, fair and reasonable as to all of the members of the class except themselves it is not sufficiently substantial for them in that it does not include additional monetary relief, which they feel they would have received if they were successful in litigating this case to a conclusion.

Petitioners submitted no evidence in support of their proposition. In fact, on the occasion when such evidence should have been forthcoming, they refused to supply it although they testified that it was available and could be produced. However, it should be worth noting that the fact that a proposed settlement is less or may be less than recovery that might result from successful litigation does not in itself mean that the proposed settlement should be disapproved. This is particularly applicable in the context of a Title VII class action where, as here, the District Court has determined that there is substantial uncertainty as to whether liability could be established.

Those Circuit Courts of Appeals that have considered the review of class action settlements in Title VII actions have reiterated several recurring principles that are ap-

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[38] *Newman* v. *Stein*, supra.

plicable to the approval of class action settlements in general.[39] Those principles are:

1. A settlement agreement is favored as an efficient device for lessening the burden on the courts.

2. By its nature, a settlement agreement implies a compromise between the parties and should not be expected to afford each class member what he might have achieved through a complete victory after successful litigation.

3. The District Court is the guardian of non-objecting class members and should reject the conditions of objectors if the immediate benefits of the settlement outweigh the possible rewards of successful litigation.[40]

In *Bryan* v. *Pittsburgh Plate Glass Co.*, the U.S. Court of Appeals for the Third Circuit considered the question of whether named and unnamed plaintiff objectors to a proposed settlement agreement accepted and approved as just, fair and reasonable by the District Court judge could be allowed to opt out and pursue their individual claims in the context of a Title VII class action maintained pursuant to Rule 23(b)(3). The appellants contended that the District Court had abused its discretion in approving the particular settlement agreement proposed when more than 20% of the class plaintiffs objected to its terms.

The Appellate Court noted that while the portion of the class opposed to a settlement is one factor to be considered in assessing its fairness, a settlement is not unfair or unreasonable simply because a large number of the class members oppose it. The court observed,

> "The drafters of Rule 23 chose as a means of protecting the class the requirement that the District

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[39] *Bryan* v. *Pittsburgh Plate Glass*, supra, and *Patterson* v. *Newspaper Deliverers Union*, supra.

[40] See also cases cited in footnote 37, supra.

Court approve the settlement. They did not require rejection of a settlement on objection of a given part of the class.

Rather than asserting that the number of objectors alone makes approval of the settlement improper, appellants argue that the number of objectors coupled with the nature of the right class members seek to vindicate make approval an abuse of discretion. The right to be free from discrimination is a personal right. Appellants argue that litigants should not be forced to abandon personal, as opposed to joint, rights without a judicial decision on the merits. The present Rule 23, however, makes no distinction for settlement purposes between class suits formerly called 'true' class actions, where the class shares a joint right or liability, and class suits formerly denominated 'hybrid' or 'spurious,' where rights or liabilities are several.

Thus, if it is improper to approve a settlement compelling appellants to abandon their claims against defendants, this impropriety must spring from the nature not of personal rights in general but of the specific rights asserted by the class here. [Citations omitted]." [41]

In *Bryan,* the Circuit Court of Appeals, and the United States Supreme Court *sub silentio,* by denying certiorari,[42] had no difficulty in concluding that, even in a 23(b)(3) class action, a settlement agreement that was just, fair and reasonable should be approved and should be made binding on all of the members of the class. This is a full, complete and definitive response to the position of the Petitioners urged at page 21 of their Brief, that somehow named plaintiff class representatives in a Title VII are entitled to retain and to individually litigate their personal claims.

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[41] 494 F. 2d 799, 803.

[42] 419 U.S. 900 (1974).

On analysis, it will be seen that the facts of record in this proceeding met all of the requirements set forth for a class action under Rule 23 and under the developing case law with respect to settlement agreements of Title VII class actions.

It is also clearly evident that the District Court did not abuse its discretion in approving the settlement agreement as just, fair and reasonable and making such agreement binding on all members of the class, including plaintiff Petitioners herein under Rule 23(b)(2) of the Federal Rules of Civil Procedure.

In accordance with the principles developed herein, the Court of Appeals found that the District Court's approval of the settlement of this action was not an abuse of discretion.

This Court should not grant a Writ of Certiorari to undertake a second appellate review of the District Court's approval.

CONCLUSION

For all of the above reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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200 E. Randolph Drive
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FMC Corporation

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA PARKERSBURG DIVISION

Mabel Flinn, Geneva Lynn, and Garnet Loiseau, Plaintiffs

vs.

FMC Corporation and Local 9 Textile Workers Union of America, AFL-CIO, Defendants

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Civil Action No. 71-3-P

COMPLAINT

Count 1

I

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343(4); 42 U.S.C. § 2000e-5(f) and 28 U.S.C. §§ 2201 and 2202. This is a suit in equity authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964", 42 U.S.C. §§2000e et seq. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by (a) 42 U.S.C. §§ 2000e et seq., providing for injunctive and other relief against discrimination in employment and (b) 42 U.S.C. § 1981, providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States. Jurisdiction of this Court is also invoked pursuant to 29 U.S.C. §§ 151 et seq., based on violations of the duty of fair representation owed to plaintiffs and the class they represent.

II

Plaintiffs bring this action on their own behalf and on behalf of other persons similarly situated pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class which plaintiffs represent is composed of female persons who are employed, or might be employed, by FMC Corporation at its plant located at Parkersburg, West Virginia and who are members or might become members of Local 9, Textile Workers of America, AFL-CIO who have been and continue to be or might be adversely affected by the practices complained of herein. There are common questions of law and fact affecting the rights of the members of this class who are and continue to be limited, classified and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise adversely affect their status as employees because of race and color. These persons are so numerous that joinder of all members is impracticable. A common relief is sought. The interests of said class are adequately represented by plaintiffs. Defendants have acted or refused to act on grounds generally applicable to the class.

III

This is a proceeding for declaratory judgment as to plaintiffs' rights and for a permanent injunction, restraining defendants from maintaining a policy, practice, custom, or usage of: (a) discriminating against plaintiffs and other female persons in this class because of race or color with respect to compensation, terms, conditions and privileges of employment and (b) limiting, segregating and classifying employees of defendant FMC Corporation who are members of Local 9, Textile Workers Union of America, AFL-CIO in ways which deprive plaintiffs and other female persons in this class of equal employment opportunities and otherwise adversely affect their status as employees because of sex.

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IV

Plaintiffs, Mabel Flinn, Geneva Lynn, and Garnet Loiseau are citizens of the United States and residents of the State of West Virginia. Plaintiffs are employed by defendant FMC Corporation at its plant in Parkersburg, West Virginia and are members in good standing of Local 9, Textile Workers Union of America, AFL-CIO.

V

(A) Defendant FMC Corporation is doing business in the State of West Virginia, and the City of Parkersburg. The Company operates and maintains a manufacturing plant and is an employer within the meaning of 42 U.S.C. § 2000e-(b) in that the company is engaged in an industry affecting commerce and employs at least twenty-five persons.

(B) Defendant Local 9, Textile Workers Union of America, AFL-CIO is a labor organization within the meaning of 42 U.S.C. §§ 2000e-(d) and (e) in that it is engaged in an industry affecting commerce and exists, in whole or in part, for the purpose of dealing with the defendant company concerning grievances, labor disputes, wages, rates of pay, seniority, departmental assignments and other terms or conditions of employment of the employees of the Company's plants and other facilities in and around the City of Parkersburg, in the State of West Virginia. The defendant union has at least twenty-five members.

VI

(A) All matters regarding compensation, terms, conditions and privileges of employment of the plaintiffs and the class they represent have been, at all times, material to this action, governed and controlled by collective bargaining agreements entered into between defendant union and

the defendant company and/or local supplemental agreements (hereinafter referred to as "agreements") entered into between the union and the company. Under and pursuant to the terms of the aforementioned agreements, the defendants have established a promotional and seniority system, the design, intent and purpose of which is to continue and preserve, and which has the effect of continuing and preserving the defendants' policy, practice, custom and usage of limiting the employment and promotional opportunity of female employees of the Company because of sex.

(B) Plaintiffs and other female employees are, and have been in the past, initially assigned to various department and job classifications as machine operators. Machine operators are paid on a production or incentive basis rather than a fixed hourly wage. Male employees are, and have been, in the past, initially assigned to various departments and job classifications at a fixed hourly wage. When technological changes occur or a reduction in force occurs due to a change in customer preference machine operators including plaintiffs and other members of the class they represent, have been laid off or forced to change departments. When an employee transfers from one department to another their plant seniority is "adjusted" or reduced pursuant to the contract between defendant company and defendant union. This adjustment adversely affects the person transferred by placing senior employees behind junior employees in their new department. Since department seniority determines the machine on which the employee works each day, the shift on which the employee works, and the time when the employee may take a vacation, this adjustment unfairly penalizes female employees in job bidding, shift preference, and vacation schedules. The lower an individual bids, the less likely they are to get

a machine and a type of yarn on which they can exceed production standards and maximize earnings. Accordingly, this adjusted seniority system has penalized plaintiffs and members of the class they represent by reducing their earnings and potential future earnings. Since men are paid a fixed hourly wage, they do not suffer a corresponding loss when they transfer and have their seniority adjusted.

VII

The effect, intent and purpose of the agreements executed by the Company and Local 9 since November 30, 1942 to the present time has been and continues to be to limit, segregate, classify and discriminate against female workers at Parkersburg, West Virginia in ways which jeopardize the jobs of and tend to deprive the said female workers of employment opportunities, restrict their wages and otherwise adversely affect their status as employees because of their sex.

VIII

(A) Neither the defendant Company nor the defendant union has made any effort or attempts to correct, modify, or disavow the policy, practice, design or purpose perpetuated in the discriminatory agreement.

(B) All of the practices herein alleged are continuing up to the present time. The way in which the departmental assignments and seniority are presently structured is intended to discriminate, and has the effect of discriminating, against plaintiffs and the class they represent.

IX

Plaintiffs and the class they represent are qualified for promotions and for training which could lead to hiring and promotions on the same basis as such opportunities are provided for male employees.

X

On November 15, 1968 several female employees of the Company including plaintiffs filed written charges, under oath, with the Equal Employment Opportunity Commission alleging denial by defendant of plaintiffs rights under Title VII of the "Civil Rights Act of 1964", 42 U.S.C. §§ 2000e et seq.

Plaintiffs have been advised by the Equal Employment Opportunity Commission that defendants' compliance with Title VII has not been accomplished within the period allowed to the Commission by Title VII and that they are entitled to institute a civil action in the appropriate Federal District Court.

(B) Neither the State of West Virginia nor the City of Parkersburg has a law prohibiting the unlawful employment practices alleged herein.

Count II

XI

Plaintiff does hereby incorporate and adopt by reference all of the allegations set forth in Paragraph I through X of Count I of this Complaint.

XII

At all times material herein Local 9 and the Textile Workers Union of America, AFL-CIO have been the certified recognized representative under the National Labor Relations Act of the plaintiffs and the class they represent and, as such have the duty, under the National Labor Relations Act, to act impartially and fairly represent the interests of plaintiffs and the class they represent.

XIII

Defendant Local 9, Textile Workers Union of America, AFL-CIO has violated and continues to violate the duty of fair representation imposed on them by the National Labor Relations Act in that they have acquiesced and/or joined in the unlawful and discriminatory practices and policies complained of in Paragraphs VI, VII, VIII and IX and they have failed to protect the female members of the Union from said discriminatory practices and policies. The Company has knowingly participated in or acquiesced in said violation of the duty of fair representation.

XIV

Plaintiffs and the class they represent have no plain, adequate or complete remedy at law to redress the wrong alleged herein and this suit for permanent injunction is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from the defendants' policies, practices, customs and usages as set forth herein.

WHEREFORE, Plaintiffs respectfully pray this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant plaintiffs and the class they represent a permanent injunction enjoining the defendants, their agents, successors, employees, attorneys and those acting in concert with them and at their direction from continuing to abridge the rights of plaintiffs in assignment of work on the basis of sex and depriving female employees of seniority when they transfer from one department to another.

2. Grant plaintiffs and the class they represent relief requiring defendant to make whole, by appropriate back pay and otherwise all such individuals who have been adversely affected by the practices and policies herein complained of.

3. Award attorneys fees and all costs, including the cost of depositions and interrogatories to plaintiffs and their attorney of record.

Boasberg, Granat & Kass, Attys.
1225 19th Street N.W.
Suite 702
Washington, D.C. 20036
tel: 202-659-3436
by: /s/ Whitworth Stokes

Date: March 19, 1971

BLEED

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Mabel Flinn, Geneva Lynn, and Garnet Loiseau, Plaintiffs

vs.

FMC Corporation and Local 9, Textile Workers Union of America, AFL-CIO, Defendants

Civil Action No. 71-3-P

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

Mabel Tibbs vs. FMC Corporation

Civil Action No. 71-2-P

SETTLEMENT AGREEMENT

In order to dispose of all issues involved in the above captioned cases now pending before the United States District Court for the Northern District of West Virginia and to compose their differences amicably and avoid costly and lengthy and uncertain litigation and peaceably resolve their differences, the parties hereto by and through their counsel for and on behalf of each and all of their respective clients do hereby agree as follows:

1. Neither of the defendants admits any liability for any of the allegations of the complaints herein filed, and this agreement shall not be construed as such admission.

2. All of the parties hereto agree that the changes in the union collective bargaining agreement and The Affirmative Action Program adopted by the Company and the Union and approved by the government have provided the necessary and desirable prospective relief to which all female members are entitled, and that no future problems are anticipated.

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3. The parties hereby mutually agree that the class of plaintiffs in the above-captioned Flinn case be redefined to be "all of those hourly paid bargaining unit female members of the Parkersburg plant of the Company's work force on the active payroll as of December 31, 1972, and in addition shall include Mabel Tibbs and Wilma Lee McCauley" and the parties shall make motions to have the court approve this class.

4. The plaintiffs herein shall dismiss with prejudice the above-captioned cases.

5. Defendants shall pay into the Court the sum of Fifty-eight Thousand Dollars ($58,000) which shall consist of $10,000 as jointly recommended plaintiff counsel fees and expenses, and $48,000 to be apportioned among the plaintiffs in such manner as the Court shall determine based upon further argument or evidence.

6. Intervenor, Wilma Lee McCauley, shall release defendant FMC Corporation of any and all claims and demands for employment arising out of those circumstances giving rise to the claim filed herein.

7. No claims or appeals of any matter covered by this agreement shall be brought by any of the counsel representing parties herein.

8. This agreement shall be contingent upon the approval thereof by the presiding judge U.S. District Court of the Northern District of West Virginia and dismissal of all issues of the pending actions.

FMC Corporation
/s/ Fred L. Davis
Local 9, TWUA, AFL-CIO
/s/ Gregory Abbey
Plaintiffs in Flinn et al,
Tibbs, et al
/s/ Whitworth Stokes

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App. 11

Notice of Hearing to Be Held 8-2-74

July 24, 1974
Ms. Mabel Flinn
1030 Laird Avenue
Parkersburg, West Virginia 26101

Ms. Geneva Lynn
400 40th Street
Vienna, West Virginia 26105

Ms. Garnet Loiseau
2303 Neal Street
Parkersburg, West Virginia 26101

Ms. Mary Custis
1501 Park Street
Parkersburg, West Virginia 26101

Re: TIBBS and FLINN vs. FMC CORP.

Ladies:

Under date of July 19, 1974, the Honorable Robert E. Maxwell, United States District Judge, Northern District of West Virginia, advising me that a hearing will be conducted in the above case at 1:30 p.m., on Friday, August 2, 1974, at the United States Courthouse, Fifth and Juliana Streets, Parkersburg, West Virginia.

Judge Maxwell requested that counsel for FMC Corporation notify the five members of the class, who have filed their notices that they do not wish to participate in the proposed settlement, of the time and place of hearing so that they may appear and be heard if they so desire.

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This notice is being sent to you in order to comply with the foregoing request.

Very truly yours,

/s/ *Fred L. Davis*
Counsel for FMC Corp.

cc: Robert E. Maxwell, Judge
James R. Renfroe, Esquire
Robert F. St. Aubin, Esquire
Gregory Abbey, Esquire
Whitworth Stokes, Esquire
James Bukes, Esquire

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App. 13

Opinion of the District Court
August 2, 1974

The Honorable Robert E. Maxwell, Judge

THE COURT: All right, Sir. The very nature of the law that comes to us in these two Civil actions is one that imposes upon the Court a great and strenuous, the Court would not say burdensome, for it is never a burden to deal with the problems of people. But it is a serious responsibility and it is a compelling responsibility. And the very explicit terms of the statutory requirements that are impressed upon the Courts are ones that the Courts must be very conscious of and very sensitive to.

Congress has in the Equal Employment Opportunities Act of 1965, impressed upon the law of the land some very stern and some very forceful practices that the evasion or the overlooking or the by-passing of is characterized by Congress as unlawful employment practices. And this is what we are dealing with here. This is what we have been dealing with.

Subsection G of Section 2000e(5) of Title 42 United States Code, speaks of the injunctive, the affirmative and the equitable relief that a Court can and in a very proper case, should grant.

Congress has been very circumspect in defining the rights of the parties in matters of this nature. Other courts of the land have been deliberative in preparing opinions having to do with issues that in some regards, touch upon the issues as presented in this case.

Basically, Congress seems to be first, eliminating intentional, unlawful employment practices. And Congress vested the Federal Courts with immense authority and

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power to enjoin a business from engaging in intentional practices that are determined to be unlawful employment practices.

The court was also vested with jurisdiction under the subparagraph (G) that I earlier referred to, to reinstate provisions, with or without back pay, and other equitable relief that the court deems is appropriate. It goes on and puts limitations on what back pay can be granted.

> "Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require that admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement—" and so on.

In other words, there are wide and broad reliefs that courts are vested with. The Court here, has not attempted to get into all of the ramifications of the various possibilities. The Court only mentions these matters to indicate that Congress, in its wisdom, has vested in the courts wide discretion to bring to an end unlawful employment practices; if in fact, unlawful employment practices exist.

Now, the mere fact—and then through the several pages of this Act, we are told of various matters that are wrong, various questions that are presented to a court. Then the method for proceeding with regard to administrative procedures, the responsibility of the Attorney General of the United States and others.

The purpose of the Act—this is very generally stated—is that no one shall be discriminated against on account of race, color, religion or sex or national origin.

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Now, we are dealing here with one and two of these areas of possible discrimination.

In the Mabel Tibbs, et al case, we are dealing with color and sex. In the Mabel Flinn, et al case, we are dealing with discrimination based on sex; so this is the attitude. This is the atmosphere and the forum within which we approach our issue here today.

We are not into a trial in this case as such. We are into the consideration of a "settlement agreement" that was filed with this Court on November 7, 1973.

It has taken the Court a little while to act on this for several reasons, but let us cast aside all other reasons except the fact that the Court has a very serious responsibility in traveling these uncharted waters to find the proper forum, the proper means, the proper procedure and the proper method of approaching this settlement agreement that is now proposed.

The fact that counsel would believe that this is entirely proper, that they believe it is an honorable settlement, that it is in their considered judgment, the appropriate way to terminate the litigation. This does not relieve the Court of the responsibility that the Court believes is vested in it by Act of Congress. And that is to oversee, overview and to ultimately pass upon the question of whether the proposed settlement agreement meets the test, the criteria, the standards that are impressed upon the Court by Act of Congress.

Now, we must never forget in a democratic republic that the will of people is spoken through the Congress and the Congress, in matters of this nature, is the supreme authority. The courts have neither the right or the prerogative to vary or to change, modify or to legislate around those matters which Congress has placed into the public domain.

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Counsel very properly and very appropriately, and I don't want it misunderstood, mention in paragraph 8 of the proposed agreement that the same is "contingent upon the approval thereof, by the presiding judge, United States Court for the Northern District of West Virginia, and dismissal of all issues of the pending action."

This, as the Court sees it, is the responsibility of the Court to pass upon this matter.

Following the receipt of this in November, the Court has had conferences with counsel and there have been innumerable pieces of correspondence exchanged back and forth to make sure that we are on bedrock, as we try to approach the issues.

Mr. Stokes has mentioned that there is a lot of litigation in this field. In one way this is true, but in another way there is a dearth of litigation that can pinpoint many of the areas as a result of our conferences and our efforts and I want to commend all counsel for the very professional, thorough and capable way that you have approached the matters before the Court; it was very helpful to the Court in a proper way.

Through this, we were able to develop a notice of the proposed settlement and we were able to develop a notice that is rather lengthy—four and a half pages. But this is all right for length is not an evil because we wanted to make this proposed notice of settlement broad enough and wide enough, rangy enough and simply and non-legalistic enough, so that it could be brought to the attention of everyone as to what was going on, the issues and what we were faced with.

It was also the considered judgment that the proposed notice be disseminated far and wide; much further perhaps, than any law currently compelling upon us would

require. And notices were sent out. The matter was brought to the attention of all 253 persons who are personally and vitally interested in the matter and from that, we now have the several ladies that speak to us either in objection or opposition or not wishing to participate in the settlement. Presumably we have 248 persons of the litigants here who wish to accept the money and wish to have the settlement consummated as proposed.

It might be strong to say that we should presume this, as to the 248 persons, but perhaps it is proper for us to say that the facts permit us to infer that this is their desire. Hopefully no one would be timid, bashful or embarrassed in coming into their court to be hearing on any matters that involve them.

Presumably we were candid and clear in saying on page 5 of our notice that went to all of these people, "that if any member of the class wishes to object to the proposed settlement or does not wish to participate therein, she may object by serving written notice—" and so forth. We then give the name and address of the clerk of our court where this should be given.

So perhaps it is right for us to look at it as a principle that there is an inference that the proposed settlement, as spelled out in the notice and the formula of distribution, is satisfied as to these people.

Although we must recognize that there is a shadow of a doubt upon that inference. It might be that the people are busy, timid or for some other reason are not letting us know. But let's hope that they are not timid about coming into their court because it is their court as much as anyone's, even those of us who sit here temporarily.

Now we are down to the question of what this proposed settlement and the formula for distribution in this proposed settlement mean with regard to the litigation.

D THROUGH

POOR COPY

Apparently as the law stands, it is the sole responsibility of the Court and the responsibility of the Court in approving or disapproving a settlement such as presented here. And this depends upon the very broad standard of what is fair, just and reasonable; these are the broad terms as the Court finds and understands the law to be, that would guide the Court in exercising its discretion here on behalf of the litigants, both plaintiffs and defendants.

The Court does not feel that in exercising this discretion that it is bound to any degree other than in very general sort of a way, to the beliefs of counsel, although as officer of the court, the Court certainly does give credence to their beliefs and their professional judgment. But what the Court is saying is that when it is all said and done, the entire record must be taken and the Court must apply the standards of just, fair and reasonable to the proposed settlement and the formula of distribution of the settlement and then determine whether the proposed agreement should be approved or not.

This depends upon a great number of things. As the Court looks at these matters there are very human elements that inject themselves to it and the ladies who have testified here today fall into what might be termed two different categories. First are the three ladies who were in, you might say, production type of work and the final two ladies who were in custodial work.

The question then presents itself as to those two categories as to whether or not liability has attached to which the defendants must respond. And if they must respond, then to what amount of money. It is very human and very proper that these five ladies say to the Court that they do not believe the amount of dollars in the proposed settlement is adequate; they do not believe it and the Court is glad to have their opinion.

They think that it should be much more money and this, of course, is a valid belief for them.

Now if I might pick up a thread I left dangling at the very outset of my remarks. Congress in its wisdom in the enactment of this statute to prevent unlawful employment practices leaned, the Court believes, very heavily on the Court's power and responsibilities to grant injunctive relief to prevent future or prospective unlawful employment practices that have been intentionally occurring or brought about.

The Court understands from representations earlier made and from what the record is before this Court, that all nature and manner of employment discrimination have now ceased. Especially those that were based on color and those based on sex.

The Court is advised that through the collective bargaining provisions of the law and the position of the defendants, this has now been reduced to a moot question. And indeed the record substantiates that advice that the Court has been given. So we are not now faced with future unlawful employment practices in the context of the issues that are drawn here in these cases.

Also, a matter that could very humanly and very properly, cloud the issue here and perhaps is deserving, as a matter of law, footnote status and that is the fact that apparently—counsel has mentioned several times and the witnesses have—there has been mentioned in the public press also, that a portion or a sizable segment of this industry is being closed or terminated because of economic reasons.

This is a matter of grave concern to the community, to the employees and to just everyone, and I am sure to the defendants, also. But it is a difficult time and it gives us a diversionary reflection in the context of the principles before the Court in litigation.

THROUGH

POOR COPY

As human as it is and as involved as it is; as much as it touches the lives of the people before the Court, the Court cannot determine the issues here however, on extraneous matters such as that, that do not go to the application of law in the four corners of the complaint and the litigation that is before the Court.

So we come down to the very nub of the issue that is before us and that is, whether or not this proposal is a proposal that meets the criteria of fair, just and reasonable settlement of the issue of back pay. We no longer have the question of prospective matters. We no longer have reinstatement problems. And we no longer have the equitable relief features in this case. We are dealing now with litigation which for all practical purposes is limited down to dollars and cents; the award of damages, the amount of money, if the defendants are liable that they would be required to pay to these individuals.

The Court has given some considerable thought to the matters that are here and has tried to think at least briefly, tried to think of some of the questions on the issue of liability that must be weighed in coming to a decision of this proposed agreement.

When it is all said and done, we are dealing with litigation that has a striking parallel to litigation that arises when we are on the highways and for one reason or another, we have a collision with another car.

Here we have the collision of alleged discrimination. There on the highway, we have the collision of vehicles.

The point I am making is this. If the plaintiff in that litigation involving the automobile fails to establish that the defendant operated his vehicle negligently and thus caused the injuries and the damages, there is no recovery by the plaintiff.

If on the other hand, it is demonstrated by the plaintiff that the defendant, for example, drove through a red light and into the side of the plaintiff's automobile, we then go to the next stage of the trial, whereby we determine how many dollars will repair and fix the side of the plaintiff's automobile.

Now carrying that into this case, we first must look at the alleged discriminations and determine if there is liability. A liability from many phases. And then if there is liability damages can follow under the law.

The damages here would be the back pay. We must remember that back pay is discretionary for the discrimination. It is a matter that weighs upon many things.

Now in thinking of the question that is before us, we have to recognize that in any cases of this nature, as was perhaps demonstrated today as well as at any other time throughout the record, there are many complexities to litigation that make this issue of responsibility and liability questionable. It makes liability subject of conjecture.

As we go back into the individual cases of each of the 253, we have to perhaps eliminate or at least determine that action taken one to another, place to place, was not based on some sound business objective or some bonafide occupational qualification rather than discrimination.

We have to get into the rights of each party, all 253. And as has been pointed out here, each case, each person and each job classification, each person in each department and his relationship to each of her coworkers and fellow workers and unique. And assuming that all of the issues of liability relating to the individuals are resolved favorably and to the class, then we are going to have to get into an evaluation of the separate claim of each member of the class.

D THROUGH

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Now this could by its very nature require the Court to have an extremely long jury trial with separate verdicts. It might, on the other hand, be handled more expeditiously and more appropriately by the reference of the matter to a special master. What I am saying here in this regard is that it is not necessarily insurmountable and not necessarily impossible at all; nothing is impossible. It can be done.

But we are dealing here with a matter, after liability is out of the way, that could involve a great amount of time.

We also must, with regard to liability, think in terms at least, of whether or not some or all of part of these claims might be subject to a statute of limitations.

Congress has established certain time limits when certain things must be done. And certain accomplishments must be achieved. So that these matters do not become stale.

So when we look at the probable outcome of litigation, we have to determine whether or not the small percentage of back pay claims that would be represented by this formula is in any way in relation to the substantiation of the claim.

In other words, with regard to Mrs. Tibbs and Mrs. Custis, I believe it was, the two custodial ladies, it would seem that their claim would be something like $300 a year, that is if liability is established.

We have to also think not just that there was sex discrimination or color discrimination, but we have to think as to whether or not, there should be under all of the circumstances in the case, a discretionary award of back pay. There may be factors that we are not even able to think of that might come into play. And these are matters that must be thought of carefully by the Court and, of course,

by the parties as we think in terms of what is here before us.

So these are only a part of the things that we think about in determining liability and in determining whether or not this is a good settlement for the parties both ways and this is the situation that the Court is confronted with.

Now, if I might take up the first three ladies, the three ladies who are production workers; Mrs. Flinn, Mrs. Lynn and Mrs. Loiseau.

We have here a situation where prospectively their litigation has been satisfied by virtue of the collective bargaining process and we are now looking to the principal contention of whether or not the Court in its discretion, would or should award back pay.

Under the proposals here we have $255 that would go to each of these ladies and this based upon their seniority. Now, they tell us in their case that they lost seniority, they lost opportunities to move on into higher paying jobs.

Now this is an allegation of sexual discrimination. And in looking to only what we have here, the loss of seniority occurred, as noted, sometime ago. The law is of fairly recent vintage and we have some questions here.

But in looking at the facts of the matter it would appear that these three ladies here, lost their job opportunities not necessarily to males. And most likely to others of female nature. I am thinking in particular to the one instance where the plant was closed and employees, most female, were brought in from Roanoke.

So the discriminations here may not necessarily be that of sex discrimination. You can see the liability here is a genuine issue to be resolved and is a serious question; a very serious question. And a court might rule against the parties on this issue of liability in light of what might be presented at the trial of the case.

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Our second category of ladies who are objecting or wishing not to participate in the settlement involves discrimination because of their sex and their color. And who say they did the same work as the men but for fifteen cents less an hour. In a forty hour week this would be something like $300 for a 52 week year. This is only roughly computed now.

The dispute is whether or not the men in the custodial force had additional duties or not. And also, the question is whether or not they were relegated some portion of that fifteen cents per hour discount because of color or not, or were the men in custodial force also colored? These are questions of liability that come to issue.

So the fifteen cents may not necessarily be because men were doing the same work and may not be necessarily because the men were white. This is all a part of it.

So as the Court takes all of these things into mind and realizing that the dollar values here are small—anyway you look at them, and the Court in searching out this issue very carefully and pondering upon it and in trying to evaluate it, trying to anticipate what and how the litigation of this nature would develop if it had gone to final trial and determination—well, the Court believes and is satisfied that the proposed settlement is just and meeting the standards of fairness and reasonableness. And with all of the matters taken into account, the Court believes that the proposed settlement should and must be approved by the Court on behalf of the parties.

So accordingly, the settlement as proposed will be approved. And the order may set forth all of the matters that are relevant and material both from the earlier orders and notices that have been presented.

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